In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

Nos. 78-606 and 78-607

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, *Petitioner*,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and ROBERT BATINOVICH, VERNON L. STURGEON, RICHARD D. GRAVELLE, CLAIRE T. DEDRICK, and WILLIAM SYMONS, JR., the members of said PUBLIC UTILITIES COMMISSION, et al., *Respondents*.

GENERAL TELEPHONE COMPANY OF CALIFORNIA, *Petitioner*,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, et al., *Respondents*.

MOTIONS OF SIERRA PACIFIC POWER COMPANY, KANSAS CITY POWER & LIGHT COMPANY, AND UTAH POWER & LIGHT COMPANY FOR LEAVE TO FILE BRIEF AMICI CURIAE

and

BRIEF AMICI CURIAE

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November 17, 1978

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MOTIONS OF SIERRA PACIFIC POWER COMPANY, KANSAS CITY POWER & LIGHT COMPANY, AND UTAH POWER & LIGHT COMPANY FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 42(1) of the Rules of this Court, Sierra Pacific Power Company (Sierra Pacific), Kansas City Power & Light Company (KCPL), and Utah Power & Light Company (Utah Power) respectfully move the Court for leave to file the accompanying brief amici curiae in support of the petitions for writ of certiorari. Counsel for

Pacific Telephone & Telegraph Company and counsel for General Telephone Company of California have given consent and encouraged Sierra Pacific's, KCPL's and Utah Power's participation. Counsel for the respondents have concluded that respondents should withhold consent.

Interest of Sierra Pacific Power Company, Kansas City Power & Light Company, and Utah Power & Light Company.

Sierra Pacific Power Company stands to be directly and gravely affected by the order of the Public Utilities Commission Decision No. 87838 (September 17, 1977) which is the subject of the petitions for writ of certiorari in the above-entitled proceedings. It is a public utility based in Nevada. It provides electrical service both in Nevada and California. The rates that it may charge its California customers are set by the Public Utilities Commission of California. All of the electricity used to supply California customers is generated in Nevada. The California Commission, in calculating the utility's cost of providing its California electrical service, takes the company's system-wide costs for producing electricity and allocates approximately fourteen percent of those costs to California.

In Sierra Pacific's most recent rate case, the Commission, in Decision No. 88337, (January 17, 1978), instructed its staff to apply to Sierra Pacific the same rate making methods for determining tax expense that were imposed on Pacific Telephone & Telegraph Company and General Telephone Company of California in Decision No. 87838 (September 17, 1977), which decision is the subject of the present petitions for writ of certiorari by Pacific and General. The staff was to produce the necessary calculations at a later hearing. Meanwhile Sierra Pacific's entire rate increase was to be held subject to refund. In a subsequent Decision No. 88644 (March 21, 1978) the Commission reaffirmed that it intended to apply the same rate treatment for Sierra Pacific as for Pacific and General, provided it (the Commission) succeeded before this Court in the present matter.

Kansas City Power & Light Company (KCPL) is a public utility that provides electricity in Kansas and Missouri. Its rates are regulated by the Kansas State Corporation Commission and by the Missouri Public Service Commission. Pursuant to the Internal Revenue Code the bulk of its income tax expense is determined for rate purposes by normalizing the effect of accelerated amortization and liberalized depreciation, and by using ratable flow-through for investment tax credit. Its rates presently in effect are set both in Kansas and Missouri using the methods of ratemaking that are consistent with Sections 167(l) and 46(f) of the Internal Revenue Code; however, there is pending before the Missouri Commission a rate proceeding in which one of the issues is whether to alter the ratemaking methods currently used to determine tax expense.

Utah Power & Light Company is a public utility which provides electric service in most of Utah and in portions of the adjoining states of Idaho and Wyoming. Its rates are regulated by the respective regulatory commissions in the states where it serves, specifically by the Utah Public Service Commission, the Idaho Public Utilities Commission, and the Wyoming Public Service Commission. Its sales for resale are regulated by the Federal Energy Regulatory Commission.

Pursuant to the Internal Revenue Code the bulk of Utah Power's tax expense for rate purposes is determined by normalizing the effect of accelerated amortization and liberalized depreciation, and by using ratable flow-through for investment tax credit. Its rates presently in effect are set by the four regulatory commissions named above, and each of those commissions is using the methods of rate-making provided for in Sections 167(l) and 46(f) which preserve eligibility for the tax benefits noted.

It is of paramount importance to the three amici curiae and their ratepayers that these benefits be preserved. If the California Commission's decision under attack is allowed to stand, there is grave danger that ratemaking bodies throughout the nation will be tempted to adopt the California rate-making methods, and that tax benefits will be lost as a result. If the benefits enjoyed by amici curiae are lost there will be an adverse impact on their cash flow position resulting from the increased tax liability and a corresponding deterioration in financial stability. Also of serious impact to these utilities and their customers is that the disallowance of the investment tax credit would deprive the utilities and their customers of the benefits of the credit now passed on to them during the life of the associated investment. The result inevitably would be higher costs to the ratepayers. Therefore, an authoritative opinion by this Court respecting the proper construction to be placed upon the Internal Revenue Code is of utmost importance.

The attached brief amici curiae emphasizes that the questions presented to this Court by Pacific and General are of direct concern not only to the two telephone companies but also to other utilities in California, since the latter can expect to see the rate making methods that have been applied to Pacific and General applied to them as well.

The attached brief also emphasizes that the correct interpretation of Sections 167(l) and 46(f) of the Internal Revenue Code, is of vital concern to public utilities commissions throughout the country that are trying to accommodate their rate making methods to the restrictions imposed by federal tax law.

The attached brief points to the need for a speedy resolution of the issues in this Court and demonstrates the inadequacy of any other method of resolving the issues. This aspect has not been developed by Petitioners to the extent deemed desirable by the moving parties herein.

For these reasons, this Motion for Leave to File a Brief as Amici Curiae should be granted.

Respectfully submitted,

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GENERAL TELEPHONE COMPANY OF CALIFORNIA,
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THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, et al.,
Respondents.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONS FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Sierra Pacific Power Company (Sierra Pacific), Kansas City Power & Light Company (KCPL), and Utah Power & Light Company (Utah Power) respectfully urge this Court to grant the petitions of Pacific Telephone & Tele-

graph Company and General Telephone Company of California for writ of certiorari to the Supreme Court of the State of California in the above-entitled proceedings.

The matter of concern is a rate order (Joint Appendix, Appendix B*) of the California Public Utilities Commission (the Commission) which the California Supreme Court, acting without opinion, declined to upset (Justice Richardson dissenting).

Primarily at issue is the correct interpretation of certain provisions in the Internal Revenue Code relating to accelerated depreciation and investment tax credit. Consequences of tremendous magnitude depend upon securing that correct and definitive interpretation from this Court. The petitioning telephone companies argue, correctly, it is submitted, that the California Commission erred in concluding that its average annual adjustment (AAA) rate treatment of accelerated depreciation qualifies as "normalization" within the meaning of the Internal Revenue Code and that its annual adjustment (AA) rate treatment of investment tax credit qualifies as "ratable flow-through" within the meaning of that Code.

The California Commission recognized that if it is wrong in its interpretation, and such interpretation goes uncorrected, the tax benefits of accelerated depreciation and investment tax credit will be irretrievably lost by operation of the Internal Revenue Code. The California Commission made a determination that these benefits must be preserved. Joint Appendix, 11-A-14A, 22A, 23A, 47A. The position of the Commission, in effect, is that while it thinks its interpretation of the Code is right, it needs to be sure, since otherwise very large amounts of additional tax would be owing to the U.S. Government which California ratepayers would ultimately have to make up. Joint Appendix, 22A.

*The references in this brief to Joint Appendix are to the "Joint Appendix for Petitioners" filed with this Court by Petitioners with their petitions for writ of certiorari.

The following quotation from two of the concurring commissioners shows that it is of vital concern to the Commission itself to know whether its AAA and AA methods make the telephone companies eligible to use accelerated depreciation and investment tax credit, respectively. These two commissioners state in their concurring opinion, in a self-reassuring observation:

> "We have . . . protected eligibility . . ."

They then go on to say:

> "No one, however, should be confused on the latter point. The *ultimate* verdict on the validity of this decision will have to be made in the United States Supreme Court and the sooner that is accomplished the better off all participants will be." Joint Appendix 70A.

Set forth below are the reasons why a definitive resolution by this Court is important not only to California but to the nation.

I.

THE ISSUES RAISED IN THE PACIFIC AND GENERAL PETITIONS ARE OF NATIONAL IMPORTANCE.

The present decision is the latest move in a battle of conflicting objectives between state governments, on the one hand, and the federal government, on the other. The battle has been waged with almost religious fanaticism for nearly

two decades. No sooner had Congress enacted the Revenue Code of 1954 allowing the use of accelerated depreciation for tax purposes than a dispute began over proper rate treatment. Commissions across the country, including the California Commission, convinced themselves one by one that the immediate tax benefit arising from accelerated depreciation was a permanent saving, and they thereby justified a flow-through for rate purposes of the lower tax in the early years of a property's life. Congressional history, on the other hand, showed that Congress had intended accelerated depreciation to provide a stimulus to the economy by providing to utilities and other businesses interest-free funds for capital expansion.

A similar fight was waged soon after Congress had created the tax benefit of investment tax credit. Should that benefit be flowed through to ratepayers, or should it be retained by the utility as a reflection of Congressional policy to stimulate the economy?

By 1969 about half of the states had adopted flow-through ratemaking and more were threatening to go in the same direction, tempted by the prospect of using federal tax dollars, in effect, to subsidize utility rates. Congress in that year acted to prevent any further defections to flow-through by enacting Section 167(l) of the Internal Revenue Code. This provision allows utilities that were not already subject to flow-through ratemaking when the section was enacted to take accelerated depreciation in computing their tax liability, but only if the regulatory body uses "normalization" in computing taxes for rate purposes. In 1972, Congress enacted a similar provision, now Section 46(f) of the Internal Revenue Code, to prevent the benefits of investment tax credit from being used to subsidize utility rates. Under that section eligibility for the credit can be maintained only if "ratable flow-through" is applied by the regulatory body in fixing rates. "Ratable flow-through" means flowing the investment tax credit through no more rapidly than ratably over the period for which depreciation expense is recognized on the property which produced the credit.

Congress cannot of course force states to make rates according to any given formula, nor can state commissions force Congress to enact tax provisions to their specifications. Rate-fixing is the prerogative of the state commission, and Congress cannot dictate in that area. Congress, on the other hand, has a legitimate interest in seeing to it that the objectives of its tax laws be attained and not aborted.

Sections 167(l) and 46(f) reflect an accommodation between state and federal interests. The states are free to set rates in any manner they choose consistent with due process. However accelerated depreciation will not be allowed for computing federal tax liability unless the regulatory commission applies "normalization" to depreciation in computing tax expense for rate purposes, and investment tax credit will not be allowed for computing federal tax liability unless the regulatory commission applies "ratable flow-through" to such credit for rate purposes.

California, and other state regulatory commissions, consider it to be their duty to flow-through to the ratepayers as much of the tax benefits as possible consistent with preserving eligibility. Congress on the other hand, created the tax benefits to stimulate the economy by providing interest-free capital, not to subsidize ratepayers.

In the present situation where the objectives of the state and federal governments are at variance, and where the line of demarcation depends upon the correct construction of a federal statute, resolution of the problem should be undertaken by this Court. It is precisely the kind of question for which this Court was created. In the present circumstances, no other court can perform that function. If this Court denies certiorari, the Commission's order will go into effect, and, the telephone companies will, we believe, be required to pay back a vast tax liability of over one billion dollars, representing the tax benefits that were taken while this dispute over rate making was being litigated, because eligibility will have been lost for the open tax years.

It is true that the Tax Court or the federal district courts could ultimately interpret Sections 167(l) and 46(f) in tax litigation, but at what an absurd cost. To use the words of the opinion of the California Commission (Joint Appendix 22A) the utilities would have incurred "staggering financial problems to be ultimately borne by the ratepayers" on account of a tax liability that neither the telephone companies, the Commission nor the Congress believes should be incurred.

The tax liability at stake in this proceeding has grown to enormous proportions because there has been no definitive determination, along the way, of the federal questions raised in this case. The Commission has expected, indeed ordered the telephone companies to take accelerated depreciation and investment tax credit for tax purposes, but the Commission has had no authoritative court guidance defining whether a particular rate treatment would meet

the requirements for eligibility. The Commission has acted in the dark. It is time for this Court to settle the matter.

The same dreadful process experienced by the telephone companies is already underway for Sierra Pacific, and could potentially extend to other utilities, both in California and in other jurisdictions. Since January of this year Sierra Pacific's rates have remained open to adjustment while the Commission decides whether or not to adopt the AAA and AA methods for Sierra Pacific.

Another aspect of the importance of obtaining a definitive ruling by this Court lies in the fact that without such ruling, bizarre questions arise on the proper division of tax burdens to utility ratepayers when the utility operates in more than one state and is subjected to regulation by commissions in different states.

Sierra Pacific's situation is illustrative. It is regulated by the California Commission and the Nevada Public Service Commission. If an order of the California Commission disqualifies Sierra Pacific from taking accelerated depreciation, there is likely to be an adverse impact on the Company's ability to raise capital, which will be felt both in Nevada and California. In such case California should increase Sierra Pacific's California rates so that Nevada ratepayers will not have to suffer because of the utility's increased cost of money. Just how much more California ratepayers should pay is an area in which there is likely to be bitter dispute between Nevada and California.

The importance of having an immediate and authoritative resolution of the correct interpretation of the limitations upon rate making to maintain eligibility for the tax

benefits is not confined to California. Commissions across the nation tend to pursue the same thought processes, and the California Commission has been a recognized leader. This Court's acceptance of the present case will prevent a recurrence of the agonizing situation in which the telephone companies, and indeed Sierra Pacific, find themselves.

CONCLUSION

For the reasons stated, certiorari should be granted. The interest of Sierra Pacific, KCPL and Utah Power in this matter is indicated hereinabove and is set forth in their Motion for Leave to File this Brief as Amici Curiae.

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CERTIFICATE OF SERVICE

I, BORIS H. LAKUSTA, a member of the Bar of the Supreme Court of the United States and Counsel of Record for Sierra Pacific Power Company, Kansas City Power & Light Company, and Utah Power & Light Company, Amici Curiae, hereby certify that on November 17, 1978, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the attached Motion of Sierra Pacific Power Company, Kansas City Power & Light Company, and Utah Power & Light Company for Leave to File Brief Amici Curiae and Brief Amici Curiae by placing the copies in an envelope addressed to each of the following persons:

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All parties required to be served have been served.

Dated: November 17, 1978.

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